



In the Matter of:

DEAN WOLSLAGEL,

ARB CASE NO. 11-079

COMPLAINANT,

ALJ CASE NO. 2009-SDW-007

v.

DATE: April 10, 2013

CITY OF KINGMAN, ARIZONA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Dean Wolslagel, *pro se*, Kingman, Arizona

For the Respondent:

Justin S. Pierce, Esq., Victoria R. Torrilhon, Esq., *Jackson Lewis LLP*, Phoenix, Arizona

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300(j)-9(i) (Thomson Reuters 2012); Water Pollution Control Act (WPCA), 42 U.S.C.A. § 1367 (West 2001); and their implementing regulations at 29 C.F.R. Part 24 (2012) (collectively, the

“Environmental Acts”). Complainant Dean Wolslagel appeals to the Administrative Review Board (ARB) from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on August 11, 2011, following an evidentiary hearing. The D. & O. dismissed Wolslagel’s complaint against his former employer, the City of Kingman, Arizona, in which he alleged that he was discharged from employment in violation of the Environmental Acts. For the following reasons, we summarily affirm the ALJ’s D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to the Administrative Review Board (Board) to issue final agency decisions under the Environmental Acts.¹ The Board reviews the factual determinations of the ALJ under the substantial evidence standard.² The Board reviews an ALJ’s conclusions of law de novo.³

DISCUSSION

The Environmental Acts prohibit employers from discriminating against employees who have participated in activities that further the purposes of those acts or relate to their administration and enforcement.⁴ To prevail on a whistleblower complaint under the Environmental Acts, “a complainant must establish by a preponderance of the evidence that the respondent took adverse action against him because he engaged in protected activity.”⁵ The complainant must “demonstrate[] by a preponderance of the evidence that the protected activity

¹ Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. § 24.110.

² 29 C.F.R. § 24.110(b). When reviewing an ALJ’s Decision and Order, the ARB is bound by the ALJ’s factual findings if the findings are supported by substantial evidence of record. “Substantial evidence” is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

³ *Carpenter v. Bishop Wells Servs. Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-035 (ARB Sept. 16, 2009); 5 U.S.C.A. § 557(b).

⁴ *Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No. 2007-SDW-001, slip op. at 4 (ARB Jan. 5, 2011).

⁵ *Id.* at 5 (citing *Fabricius v. Town of Braintree/Park Dep’t*, ARB No. 97-144, ALJ No. 1997-CAA-014, slip op. at 3-4 (ARB Feb. 9, 1999); *Carroll v. Bechtel Power Corp.*, 1991-ERA-036, slip op. at 12 (Sec’y Feb. 15, 1995)).

caused or was a motivating factor in the adverse action alleged in the complaint.”⁶ Where the complainant meets his or her burden of proving that the protected activity caused or was a motivating factor in the adverse action taken against him, the respondent will nevertheless avoid liability if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.⁷

In this case the ALJ found that Wolslagel, through various internal and external complaints about City operations, engaged in whistleblower activity protected under the Environmental Acts.⁸ The ALJ nevertheless concluded that Wolslagel failed to prove that his protected activity caused or was a motivating factor in the City’s decision to discipline him and terminate his employment.⁹ Citing to multiple examples of Wolslagel’s unprofessional behavior, the ALJ held that “the City convincingly demonstrated it fired Wolslagel because of his ongoing problems with insubordination, rudeness, and hostility towards coworkers, managers, and third parties.”¹⁰

Having reviewed the evidentiary record as a whole, and upon consideration of the parties’ respective briefs on appeal, we find the ALJ’s findings of fact with respect to the issue of causation supported by substantial evidence of record. We also find the ALJ’s legal conclusions to be in accordance with applicable law. Accordingly, for the same reasons as stated by the ALJ,¹¹ we conclude that Wolslagel has failed to prove that his protected activity caused or was a motivating factor in the City’s termination of his employment.

⁶ 29 C.F.R. § 24.109(b)(2). A “motivating factor” is “conduct [that is] . . . a ‘substantial factor’” in causing an adverse action. *Onysko v. State of Utah, Dept. of Env’tl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004 (ARB Jan. 23, 2013) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

⁷ 29 C.F.R. § 24.109(b)(2).

⁸ *See* D. & O. at 29-32.

⁹ *Id.* at 41.

¹⁰ *Id.* at 35-37, 41.

¹¹ We take one exception to the ALJ’s analysis, albeit consisting of harmless error in this case. The ALJ determined that Wolslagel established a prima facie case of retaliation based on the temporal proximity between his protected activity and the City’s adverse actions. D. & O. at 27-28. Establishment of a prima facie case of retaliation constitutes the lesser burden of proof required of a complainant at the investigation stage before OSHA. *See* 29 C.F.R. § 24.104(e). At the hearing stage before an ALJ, upon a hearing on the merits, the burden of proof required of the complainant is, as previously noted, proof by a preponderance of the evidence that the complainant’s protected activity caused or was a motivating factor in the adverse action. *See supra* at 2 & n.5, citing *Powell*, ARB No. 09-071, slip op. at 5. Proof of a prima facie case is no longer the standard at that stage. Nevertheless, in this case the ALJ’s error is harmless, as the ALJ ultimately cited the correct law and applied the proper burdens of proof.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order dismissing Wolslagel's complaint.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge